(1)

No. 90-847

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

WILLIAM PYMM, EDWARD PYMM, JR.,
PYMM THERMOMETER CORPORATION, and
PAK GLASS MACHINERY CORPORATION,

Petitioners,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF NEW YORK

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November 7, 1990

QUESTION PRESENTED

Whether, under the Supremacy Clause, the Occupational Safety and Health Act ("OSH Act" or "OSHA") of 1970 preempts state criminal prosecutions of employers based on conduct or conditions regulated by the Act, when the conduct and conditions in question are in compliance with the Act's standards and requirements.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

LEGISLATIVE MATERIALS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No.

WILLIAM PYMM, EDWARD PYMM, JR.,
PYMM THERMOMETER CORPORATION, and
PAR GLASS MACHINERY CORPORATION,

Petitioners,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

William Pymm, Edward Pymm, Jr., Pymm Thermometer Corp., and Par Glass Machinery Corp., ("petitioners") hereby petition for a writ of certiorari to review the judgement of the New York State Court of Appeals.

OPINIONS BELOW

The Court of Appeals of the State of New York dated October 16, 1990; decision New York State Supreme Court, Criminal Term, (Owens, J.), see appendix for text.

JURISDICTION

The opinion of the New York Court of Appeals was entered on October 16, 1990.

The Jurisdiction of this Court is invoked under 28 U.S.C. subsection 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in pertinent part:

> The Constitution, and the Laws of the United States .... shall be the supreme Law of the Land .... U.S. Const. art. vi. cl. 2.

Section 18 (a) of the Occupational Safety and Health Act of 1970 provides:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

29 U.S.C. subsection 667 (a).

Section 18 (b) of OSHA provides:

> Any State which, at any time, desires to assume re- sponsibility for development and enforcement therein of occupational safety and health standards relating to any

> occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. subsection 667 (b).

Section 4 of the OSHA provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. subsection 653 (b)(4).

STATEMENT

In 1970, Congress enacted the Occupational Safety and Health Act to establish "uniformly applied occupational safety and health standards." S. Rep. No. 91-1282, 91st Cong., 2d Sess.1 (1970), reprinted in Legislative History of the Occupational Safety and Health Act of 1970

("OSH Act Legis.Hist.") at 141 (1971). In passing this law, Congress recognized that a solution to the problem of workplace safety required "comprehensive Federal legislation which would apply to all industries, and in a single national effort . . . " See 116 Cong. Rec. 35607 (Oct. 8, 1970), reprinted in OSH Act Legis. Hist. at 297. Congress made the OSH Act comprehensive because it found that no one benefited from the irregular standards and enforcement practices then existing among individual states; uniformity was deemed essential for the sake of employees and employers alike.

In addition to its concern for employee health and safety, Congress was concerned about the disparate treatment of employers from state to state and the competitive disadvantages imposed upon "conscientious" employers. 116 Cong. Rec. 37325 (Nov. 16, 1970), reprinted in OSH Act Legis. Hist. at 413. Thus, it saw a need to provide for

"fair and even" enforcement. 116 Cong. Rec. 36513 (Oct. 13, 1970), reprinted in OSH Act Legis. Hist. at 324.

Congress understood that "the development of occupational health and safety standards involves technical and complex problems requiring professional expertise and competence." S. Rep. No. 91-1282 at 63, reprinted in OSH Act Legis. Hist. at 202; see also S. Rep. No. 91-1282 at 1-7, reprinted in OSH Act Legis. Hist. at 141-147. Thus, the OSH Act requires that federal "development of standards... shall be based upon research, demonstrations, experiments, and such other information as may be appropriate." 29 U.S.C. subsection 655 (b)(5).

The standards promulgated under OSHA were intended by Congress to reflect a delicate balancing of competing interests, measured by the best available scientific evidence. The Secretary of Labor is

specifically directed to take account of "other considerations"- including "feasibility" and "experience"- in addition to the "highest degree of health and safety protection" in promulgating standards. Thus, an "occupational safety and health standard" is defined as a standard which is "reasonably necessary or appropriate to provide safe or healthful employment. . . . " 29 U.S.C. subsection 652 (8). Exposure standards for toxic substances are set at a level "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health. . ." 29 U.S.C. subsection 655 (b)(5) (emphasis added). In fact, Congress specifically revised an earlier draft of the OSH Act "to make it perfectly clear that it does not require. . . standards that would assure an absolutely risk-free workplace." See Industrial Union Department v. American

Petroleum Inst., 448 U.S. 607, 641, 646-649 (1980) (Stevens, J.) (Nothing that "the legislative history . . . supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm." Id. at 646).

The legislative history of the OSH Act also makes clear that Congress sought to encourage employer cooperation. Thus, Congress expressly intended that the purpose of the Act would be best achieved through "preventive rather than punitive" means. 116 Cong. Rec. 42203 (Dec. 17, 1970), reprinted in OSH Act Legis. Hist. at 1210. In this regard, Congress expressly considered the inclusion of criminal penalties in the Act and decided that they would be limited.

Congress intended the OSH Act to preempt state criminal laws. The legislative history of the act establishes

the Congress had full knowledge of how the states had gone about the regulation of occupational safety and health. The departments of Labor and Health, Education, and Welfare had submitted to Senate and House committees considering workplace safety legislation several comprehensive reports describing the states' programs. (V. Trasko, Bureau of Occupational Safety and Health, Education, and Welfare, Status of Occupational Health Programs in State and Local Government (January 1969), printed in Occupational Safety and Health Act, 1970: Hearings on S. 2193 and S. 2788 before the Subcommittee, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st and 2d Sess., Part 1, at 103-109 (1970) ("Senate Hearings"), and in Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294 and H.R. 13373 before the Select Subcommittee on Education and Labor, 91st

Cong., 1st Sess., Part 1, at 103-110 (1970) ("House Hearings"); Bureau of Labor Standards, U.S. Dept. of Labor, Directory and Index of Safety and Health Laws and Codes (Undated, submitted Sept., 25, 1969), printed in Senate Hearings at 1327-1443 and in House Hearings at 243-358; A. Hosey and L. Ede. Bureau of Occupational Safety and Health, Dept. of Health, Education, and Welfare, A Review of State Occupational Health Legislation (Undated, submitted Sept., 24, 1969), printed in House Hearings at 74-103, and in Senate Hearings at 100-137).

Congress was aware that the states had passed many occupational safety and health regulations and that they were commonly enforced by criminal sanctions. (Senate Hearings at 123-124 (quoting state laws providing for fines, imprisonment, or both, and making violations misdemeanors).

New York had a provision in its labor

code making state general criminal law applicable to violations of its "general duty" provision, akin to that contained in 5(a)(1) of the act. (N.Y. Lab. Law 200, 214 (McKinney 1986). More than 36 States had similar "general duty" provisions. s. Rep. 1282, 91st Cong., 2d Sess. 9-10 (1970) (hereinafter "Senate Report"), reprinted in Senate Subcommittee on Labor, Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. at 141, 149-150 (1971) ("Leg. Hist.").

Some documents submitted to the Senate committee even noted the possibility of state prosecutions of employers for criminal negligence. Senate Hearings at 1585, 1588, 1595, 1602, reproducing coroner's verdicts noting the possibility that several workplace deaths might be attributable to "criminal negligence." Significantly, Congress nevertheless found that the states' frequent use of criminal sanctions had

proven counterproductive. Congress concluded some states had excellent state enforcement programs, (See, e.g., Legis. Hist. at 1049 (remarks of Rep. Karth regarding California and New York); House Hearings at 258-324, 395-6, 441-486, 491-497 (testimony of C. Hagberg of Wisconsin and M. Catherwood of New York); Senate Hearings at 258-324 (testimony of C. Hagberg of Wisconsin) and 413 (testimony of F. Barnako). But some state laws generally were so inadequate that oversight of state efforts by the U.S. secretary of labor was needed to ensure "a comprehensive, nationwide approach." (Senate Report at 4, Legis. Hist. at 141, 144. See also HRep No. 1291, 91st Cong. 2d Sess. Legis. Hist. 831, 845; (1970), reprinted in Legis. Hist. at 1003 (remarks of Rep. Daniels that state laws are "woefully lacking in protection for employees"), and at 1049 (remarks of Rep. Karth). Congress found that even the

states with superior programs had very different standards and that the imposition of uniformity was desirable. Legis. Hist. at 513 (remarks of Sen. Muskie); see also House Hearings at 494-5.

It is clear that Congress intended to displace state laws and establish a system for the "development and administration, by the Secretary of Labor, of uniformly applied occupational safety and health standards." (Senate Report at 1, Legis. Hist. at 141).

In short, Congress intended to have Section 18 strip all states of their workplace health and safety powers until each state, on a state-by- state basis, obtained federal approval to recover such powers. (Senate Report at 18, Legis. Hist. at 158. See also Legis. Hist. at 525 (remarks of Sen. Saxbe that the Senate bill "does not take away forever the power of the States to regulate their health and safety...The bill does contemplate... that

the Senate can regain their control...") (remarks of Sen. Dominick that a provision in the bill "permits the States to regain some administrative control, but I do not think we should be under any illusion. The Federal Government is going to be setting standards for safety and the health criteria for all industries and businesses...").

The legislative history also shows that Congress decided, after considerable thought, that regulation of occupational safety and health was best accomplished through an enforcement scheme heavily weighted in favor of civil sanctions. For example, HR 4294, provided:

> Any person who willfully violates or fails or refuses to comply with [the Secretary's standards] shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $5000 or by imprisonment for not more than six months, or by both.... HR 4294, 91st Cong. 1st Sess. 9 (1969), reprinted in Legis. Hist. at 659, 668.

The bills that ultimately were reported and passed by the House eliminated these broad criminal sanctions for violations of standards and substituted civil penalties for willful as well as other violations. (HR 16785, 91st Cong., 2d Sess. (1970), reprinted in Legis. Hist. 721, 744-7; HR 19200, 91st Cong., 2d Sess. (1970), reprinted in Legis. Hist. at 763, 803-805).

The first administration-backed bill in the Senate, S 2788, and early substitute bills, such as S 4404, provided only civil penalties for willful violations of standards and no penalties for other violations. S 2788, 10, Legis. Hist. at 54-55; S 4404, 91st Cong., 2d Sess. 17 (1970), reprinted in Legis. Hist. at 73, 113-114.

The House-Senate conference committee established an enforcement scheme that adopted the civil penalty structure of the House-passed bill and added a scaled-down version of the Senate's criminal provision,

limiting criminal penalties to willful violations of standards associated with the death of an employee. (Levin, OSHA and the Sixth Amendment: When Is A "Civil" Penalty Criminal in Effect, 5 Hastings Const. L.Q.1013, 1014-1020 (1978)).

In providing for comprehensiveness and uniformity, Congress did not intend to preclude any state involvement in the field of occupational health and safety. Rather, Congress undertook to balance "the legitimate rights and interests of the States and the proper role of the Federal Government," (116 Cong. Rec. 38384 (Nov. 23, 1970), reprinted in OSH Act Legis. Hist. at 1025), and expressly delineated the proper state role in regulating and enforcing workplace conduct and conditions.

Section 18 (a) provides that a state may assert "jurisdiction" under state law "over any occupational safety or health issue with respect to which no standard is

in effect ..." subsection 18 (a), codified at 29 U.S.C. subsection 667(a). By its terms, Section 18 (a)expressly grants the states authority or justification over workplace condition which are not regulated by the federal government under the OSH Act. Section 18 (b) sets forth the state's role where OSH Act standards are in effect. It authorizes state action, but only pursuant to a federally approved state plan. To be approved, the state plan must provide for development and enforcement of health and safety standards which "are or will be at least as effective [as OSH Act standards] in providing safe and healthful employment." Subsection 18(c)(2), codified at 29 U.S.C. subsection 667 (c)(2). Where a proposed state standard is applicable to products distributed in interstate commerce, it will be approved only is the state can show that the state standard is "required by compelling local conditions" and does "not

unduly burden interstate commerce." Thus, states have the option of establishing equally effective standards or enforcement mechanisms only if they obtain prior federal approval to do so.

Several states in fact have done so. For example, under Arizona's state plan, a wilful violation resulting in the death of an employee is punishable by a fine of up to $150,000 against an individual and $1,000,000 against a corporation and imprisonment for up to one and one-half years. (Ariz Rev. Stat. Ann. subsection 23-418). Under Puerto Rico's plan, a wilful violation causing death may result in imprisonment for up to three and one-half years for the first violation, and up to four and one-half years for a second violation. (P.R. Laws Ann. tit. 29, ch. 16 subsection 361x).

North Carolina's state plan expressly provides for the application of state

general criminal law for wilful violations that result in death. (N.C. Gen. Stat. subsection 95-139). New York does not have any state plan.

Section 4, codified at 29 U.S.C. subsection 653 (b)(4), is a "savings clause" which says nothing about state regulation, but instead addresses the effect of the OSH Act on private rights of action existing under state common law or statutes. Section 4 provides that nothing in the OSH Act shall affect the "workmen's compensation law" or other "common law or statutory rights, duties or liabilities of employers and employees" that might arise in connection with workplace conditions. By its terms, Section 4 "saves" only actions between employers and employees which arise under state law. Section 4 says nothing about state-initiated enforcement actions, whether civil or criminal in nature. Certainly, neither the statute not its legislative

history suggests that Section 4 was intended to preserve state-initiated actions where such actions otherwise would be expressly preempted under Section 18(b).

PROCEEDINGS IN COURT BELOW

Petitioners were charged with violation of state criminal laws relating to an alleged illness to a single employee which it is said occurred during the course of his employment but was not discovered until months after his termination of same. A federally regulated substance, to wit; "mercury vapor", is the stated cause of the illness. Mercury is used exclusively in manufacture of thermometers at petitioners' plant. The State alleges the employee is suffering from subjective symptoms associated with mercury vapor intoxication. These symptoms are common to many other illnesses as well as the side effects of the many medications prescribed to the said

employee.

Since 1981, petitioners were under the exclusive jurisdiction of OSHA inspectors who had found several over exposures to mercury among five of petitioners' sixty five employees. In order to violate a federal regulation, a worker must be subjected to an excess of .1 milligrams of mercury vapor in his breathing zone for a time weighted eight hour working day. Mercury vapor exists in a thermometer plant using mercury as it's primary substance. According to the government standards this vapor does not create a health hazard to a worker unless and until such time as it exceeds the required standard.

Petitioners agreed with OSHA to eliminate all such over exposures to mercury in their plant. The abatement date was ultimately set at October 1985. By that date petitioners had eliminated all over exposures to mercury.

During the October 1985 inspection, OSHA inspectors allege the discovery of a mercury reclamation room which was located in the basement portion of petitioners plant. They claimed no knowledge of this room prior, despite their unlimited access to petitioners plant. The room was inspected and citations were issued to petitioners. There was no proof that any worker was ever exposed to mercury vapor in excess of the OSHA standard while working in the room.

After a jury trial, petitioners were convicted of Conspiracy in the Fifth Degree (P.L. 105.05); Falsifying Business Records in the First Degree (P.L. 175.25); Assault in the Second Degree (120.05); Assault in the First Degree (120.10) and Reckless Endangerment in the Second Degree (120.20). Trial Court (Owens, J.) set verdict aside and citing federal preemption (see appendix). Thereafter Appellate Division of

the New York State Supreme Court reversed the order of the Trial Court and reinstated convictions. (People v. Pymm Thermometer, 151 AD2d 133, 546 NYS2d 871 (1989).

The New York State Court of Appeals affirmed the Appellate Division decision.

The theory of the prosecution rests upon the speculation that since the employee, Vidal Rodriguez, worked periodically in the mercury reclamation portion of the plant, he must have become ill from exposure to mercury vapor. His presence in the room occurred same eighteen months prior to the OSHA inspection. Rodriguez does not allege any such symptoms until several months after leaving the employ of the appellants and while applying for workman's compensation.

There is no such claim with respect to any other person who worked in the mercury reclamation cellar. There were, however, numerous other employees who worked in the

room.

Petitioners contend that under the facts of this particular case, by virtue of entry into appellants plant and subjecting them to mercury vapor standards, OSHA preempts the State from fashioning a criminal prosecution based upon the exposure of a single employee to mercury vapor. Additionally, preemption is mandated since petitioners cannot, as here, comply with the Federal regulation regarding mercury vapor without being subjected to State criminal liability. The State is free, as in this case, to charge an employer with violations of criminal law if an employee alleges the subjective symptoms of illness. This regardless of his individual intolerance to mercury vapor level in the air in the workplace. Traditionally such claims have been resolved by the worker's compensation laws and other tort liability, if applicable.

REASONS FOR GRANTING THE PETITION

The decision of the New York Court of Appeals subjects petitioners to criminal liability potentially involving years of imprisonment and significant fines based on workplace conditions which have been comprehensively regulated by the federal government. The several over exposures to mercury vapor in one of petitioners' departments were corrected in accordance with an agreement to abate same by a scheduled date. An important and recurring question of the scope of preemption under the Occupational Safety and Health Act of 1970 is at issue. The analysis by the court below represents serious misapplication of this Court's preemption holdings. The decision below eliminates the uniformity of health and safety standards in the workplace that Congress believed to be vital to ensuring stable employment relations.

The question whether an employer can be

exposed to criminal prosecutions by state authorities for conduct regulated by OSH Act is one this Court should decide.

In the case below prosecutors were permitted to grossly exaggerate mercury vapor levels in their confused and erroneous application of the actual federal standard.

As an example, prosecutors were allowed to exaggerate levels of mercury vapor found in so-called reclamation room when in fact, no OSHA standard was found to be violated, i.e., exposure of more than 1. milligram in a breathing area of work for a time weighted eight hour period. Readings of a few seconds duration with no worker present grossly distorted the OSHA mercury standard. If for no other reason, this Court should remedy this type of selective use of OSHA safety standards for use in criminal prosecutions.

Federal preemption of state law under the Supremacy Clause turns on congressional

intent. Under the preemption doctrine, preemption is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982). Where Congress intends a matter to be controlled exclusively by federal law, it is said to "preempt the field." In that situation, "any state law falling within that field is preempted," even if the state law complements federal statutory purposes or standards. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). See also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 155-156 (1942).

Preemption is also required when state law conflicts with federal law. See Fidelity Federal Savings & Loan Ass'n, 458 U.S. at 153; Florida Line & Avocado Growers,

Inc. v. Paul, 373 U.S. 132, 142-143 (1963). Conflict will be found where federal law and state law impose inconsistent duties making compliance with both impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1940). See also Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469 (1984); Jones v. Rath Packing Co., 430 U.S. 519.

The test of whether both federal and state regulations may operate . . .is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." Florida Lime & Avocado Growers, Inc., 373 U.S. at 142. Conflict in "technique" is considered as disruptive as conflict in "over policy." Amalgamated

Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274, 287 (1971). In addition, "the relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . " Fidelity Federal Savings & Loan Ass'n, 458 U.S. at 153.

Preemption does not turn on the type of state law involved. See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 197 (1978). State laws of general applicability, criminal laws and administrative regulations all are subject to the dictates of the Supremacy Clause. See Capitol Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The inquiry is not whether the state law is a "regulatory" provision or a "general" criminal or tort law, but instead, whether the state law is brought to bear on conduct regulated under the preemptive

umbrella of federal law. Sears, Roebuck & Co., 436 U.S. at 197, 199. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274, 292 (1971).

As stated Section 4 is designed to preserve state workmen's compensation and other private civil tort actions. Although it makes clear that Congress did not intend the Act to have any effect on the "rights, duties or liabilities of employers and employees", the provision says nothing about actions undertaken by the state itself.

Section 18 addresses the preemptive effect of the Act on state-initiated actions. On an "issue with respect to which a Federal standard has been promulgated," which is this case, a state may only "assume responsibility for development and

enforcement" of standards relating to such issues if a federally-approved state plan is in place. 29 U.S.C. subsection 667 (b). Thus, the plain meaning of the OSH Act makes clear that Congress intended to preclude any state-initiated action regarding workplace safety, including "general" criminal prosecutions, unless undertaken pursuant to an approved state plan. No such plan exists and, therefore, under the express terms of Section 18 the enforcement action brought in the State of New York is preempted.

Even absent express preemption, OSHA is a federal effort to "preempt the field." The statute and its legislative history repeatedly reinforce the idea that when there are federal standards in place, those standards are intended to be the uniform and comprehensive standards (in the absence of an approved state plan). See 29 U.S.C. subsection 667(a) & (b); S. Rep. No. 91-1282

at 1-7, reprinted in OSH Act Legis. Hist. at 141-147.

Here, the criminal charge is based upon breach of a duty to provide a safe workplace, i.e., exposing employees to mercury vapors which are regulated by the OSH Act. OSHA has taken it upon itself to define the employers' duties, there can be no question that the state is operating within the "field" of exclusive regulation-regardless of what category or label the state uses to define its legal action.

State prosecutions based on workplace conditions conflict with the federal law because the OSH Act mandates uniform development and enforcement of fair and balanced occupational safety and health standards, which are established pursuant to scientific standards and procedural protection. Ad hoc state prosecutions for conduct regulated by the OSH Act, such as the one endorsed by the court below, have

resulted and will continue to result in the enforcement of different standards of occupational health and safety.

If the ruling of the New York Court of Appeals is left in place, the development of occupational health and safety standards in the manner Congress intended and provided for in the OSH Act will be undermined. Instead of experienced and knowledgeable federal officials setting uniform national workplace safety standards based on available scientific evidence, see supra at 4, an entire "secondary" level of "workplace standards" will be established by local prosecutors and juries, wholly uniformed (and, most likely, wholly unconcerned) with the economic and scientific complexities of workplace safety. Such local authorities will simply decide, with guidance, whether to deem a particular workplace environment "safe"- regardless of what standards the federal government, under OSHA, has

established to regulate that environment.

These local "standards" will be established on a subjective and post-hoc basis, rather than the basis of objective scientific criteria, as required under subsection 655 (b)(5), thereby negating congressional efforts to ensure that employers and employees know what their rights and duties are. See supra at 3. This regulation of federal standards to a subordinate role could not be more clearly illustrated than by the State's successful contention that OSHA standards simply are irrelevant in this case.

The decision below invites localized and politicized decision making on workplace standards, the very conditions that the OSH Act was designed to correct.

Under the decision below, local prosecutors will have discretion to use imprecise judgement as to workplace safety to indict an employer or even, in extreme

cases, for purpose of political harassment. Moreover, it seems plain the Congress' intent to encourage employer cooperation will be thwarted if employers (such as petitioners) who comply with OSH Act standards become subject to local prosecution.

This case is one of a number in which local prosecutors have attempted to use state criminal prosecutions in an effort to "regulate" conduct or conditions otherwise exclusively regulated under the OSH Act. Not only does the sheer volume of reported cases indicate that the decision below involves an issue of federal law that is recurring and important.

Several lower Courts and Appellate decisions have applied the preemption doctrine to criminal cases such as petitioners, only to have higher Appeals Court reverse and find the preemption doctrine not applicable to state criminal

prosecutions. (People v. Chicago Magnet Wire Corp., 126 Ill.2d 356 534 NE.2d 962 (1989) cert. denied sub. nom Astav. Ill. 110 S.Ct. 152; People v. Hegedus, 432 Mich 598, 443 N.W.2d 127 (1989); State v. Black, 144 Wis.2d 745, 425 N.W. 2d 21 (1988)).

Thus far one state has dismissed a criminal prosecution on preemption grounds (Colorado v. Kelran Const. Inc., (Dist. Ct.) 13 OSHC 1898 (1988). In Thornock v. State, 745 P2d 324 (Mont. 1987). Preemption was applied to dismiss a case against the State of Montana. In addition, United States District Court of Appeals for the Second Circuit also preempted municipal action. (Environmental Encapsulating Corp. v. City of New York, 885 F2d 48).

In Texas, criminal convictions were reversed (Sabine Consol. Inc. v. State, 756 SW2d 865 (Tex. Ct. App., 1988)); appeal pending in Texas Supreme Court since May 1988).

Additionally, Federal criminal prosecutions are becoming more prevalent as the OSHA Act is being invoked as intended by Congress (See U.S.A. v. Pandelna, Docket 90-10130, U.S. Dist. Court, Boston, Ma).

It is clear that the issue of OSH Act preemption is a recurring one which ultimately will have to be resolved by this Court. The number of criminal prosecutions in recent years compared to prior years demonstrates a marked trend toward greater use of state criminal laws to enforce workplace standards, which will only continue if left unchecked. Employers are subject to criminal prosecution for conduct and conditions which may, as in this case, comply with federal standards. State courts so far have been unable to resolve the issue in any consistent manner. Thus, employers and employees alike are provided no guidance as to their respective rights and responsibilities.

In addition, the integrity of the OSH Act is being eroded. State and local prosecutors are implementing and enforcing state "standards" without obtaining federal approval of a state plan, in direct contravention of Congress' intent. The confidence of employers and employees in the significance and effectiveness of OSH Act standards is undetermined, especially in the case of prosecutions for conduct which complies with those federal standards. And the ability of the OSH Act's administrators to fulfill Congress' objective of uniform, predictable and effective national workplace safety standards is seriously compromised. This case presents an issue subject to the jurisdiction of the Court, and that should be accepted for discretionary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 7, 1990

APPENDICES

Remittitur

Court of Appeals
State of New York

The Hon. Sol Wachtler, Chief Judge, Presiding

2 No. 189

The People &c.,
Respondent,
v.
William Pymm, Edward Pymm, Jr.,
Pymm Thermometer Corporation, and
Pak Glass Machinery Corporation,
Appellants.

The appellant(s) in the above entitled appeal appeared by Albert James Brackley, Esq. and Lewis D. Cohen, Esq.; *the respondent(s) appeared by* Hon. Charles J. Hynes, District Attorney, Kings County and Hon. Robert Abrams, Attorney General of the State of New York; aned amici curiae appeared by Washington Legal Foundation, National Association of Manufacturers and Berle Kass & Case, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Chief Judge Wachtler. Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Kings County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany,

October 16, 1990.

STATE OF NEW YORK

COURT OF APPEALS

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2 No. 189

The People &c.,

Respondent

v.

William Pymm, Edward Pymm, Jr., Pymm Thermometer Corporation, and Pak Glass Machinery Corporation,

Appellants.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Albert J. Brackley, Brooklyn for appellant William Pymm.

Lewis D. Cohen, Brooklyn, for appellant Edward Pymm.

Charles J. Hynes, DA, Kings County (Shulamit Rosenblum, Jay M. Cohen of counsel) for respondent People.

Robert Abrams, Attorney General (Nancy Stearns, O. Peter Sherwood, Lawrence S. Kahn of counsel) for respondent State.

Michael B. Gerrard, Anne C. Weisberg, NY City, for NY Committee for OSHA; Daniel J. Popeo, Richard A. Samp, Washington, D.C., for Washington Legal Foundation; Jan S. Amundson, Quentin Riegel, Washington, D.C., for National Association of Manufacturers; amici curiae.

WACHTLER, Ch.J.:

In this case, we consider whether federal regulation of workplace

safety under the Occupational Safety and Health Act of 1970 (29 USC § 651 et seq) (the Act) preempts New York's efforts to punish culpable employer conduct under its general criminal laws. We conclude that the Act does not expressly or impliedly preempt state prosecution of employers whose criminal activity happens to be centered in the workplace or directed against employees. The order of the Appellate Division reinstating the jury's guilty verdict against these defendants should therefore be affirmed.

I.

The corporate defendants Pymm Thermometer Corporation (PTC) and Pak Glass Machinery Corporation (Pak Glass) are domestic corporations that operate on two separate floors of the same Brooklyn

building. PTC, which is located on the second floor, manufactures thermometers for clinical use, while Pak Glass, located on the ground floor, services and repairs the machinery used by PTC. Defendant William Pymm was vice-president of both corporations from 1981 to 1984 and has been their president since 1984. Defendant Edward Pymm, Jr. holds the title of vice-president and has served as plant manager for both operations since 1981.

Mercury contamination has been an ongoing problem at PTC, posing a serious health risk to PTC's employees. The mercury used to fill the thermometers, although a liquid at normal temperatures, readily evaporates into the surrounding air. Once inhaled, mercury vapor passes from the lungs into the bloodstream and is then circulated throughout the rest of the

body, including the brain. Mercury can also enter the body through breaks in the skin, or can be ingested by eating food that has come in contact with mercury or by failing to wash mercury-contaminated hands before eating. Mercury vapor is highly toxic and long-term exposure to low concentrations of mercury can result in permanent neurological damage. Victims of mercury poisoning experience restlessness, sleeplessness, loss of appetite, faltering gait, tremor of the hands, unsteadiness, difficulty in concentrating, and memory loss.

A number of inspections dating back to the early 1970's revealed that workers at PTC's second floor manufacturing facility were not adequately protected from the dangers of mercury poisoning. Before the enactment of the

Act, the Division of Industrial Hygiene of the State Department of Labor monitored workplace safety at PTC by conducting semi-annual inspections of the PTC plant. In 1975, the Occupational Health and Safety Administration (OSHA) assumed responsibility for workplace safety. OSHA conducted four inspections of the facility between 1981 and 1984. These inspections revealed hazardous working conditions in the second floor manufacturing area. Workers did not wear protective gear, such as gloves or respirators, and the workplace was dangerously contaminated with mercury. Both William and Edward Pymm were warned of the dangers of mercury poisoning and were encouraged to adopt measures that would minimize the possibility of workers either ingesting liquid mercury or inhaling mercury vapors.

PTC was twice cited by OSHA as a result of the workplace conditions observed on the second floor.

In 1985, OSHA learned that PTC was operating a clandestine mercury reclamation operation in the basement of the building. The defendants had omitted the basement area from any of the earlier inspections, despite the fact that OSHA inspectors had asked to see all of the area in which mercury was being used. When OSHA agents first confronted William Pymm about the reclamation facility, he denied that it even existed. Testimony at trial established that PTC had been recovering the mercury from broken thermometers since 1983. Vidal Rodriguez, a PTC employee since 1981, testified that he had fed the broken thermometers into a glass crusher as part of the reclamation

process. The machine ground the thermometers, releasing the mercury, which was passed into a filtration trough, separated and collected. An initial inspection of the reclamation operation had revealed boxes loaded with broken thermometers piled against the walls with mercury seeping out of the boxes and leaking out onto the floor. Readings taken at this time revealed mercury vapor readings almost five times the level permitted by OSHA. Although the cellar was almost entirely without ventilation, Rodriguez for the first several months was without a respirator and only later was given a single respirator to be shared with another worker. In 1984, physicians examining Rodriguez noticed that he had developed neurological symptoms that were consistent with mercury poisoning.

Experts testifying at trial attributed these abnormalities, including damage to Rodriguez's brain, to long-term exposure to mercury.

Defendants were charged with conspiracy in the fifth degree (Penal Law § 105.05[1]; falsifying business records in the first degree (Penal Law § 175.10); assault in the first degree (Penal Law § 120.10[4]; assault in the second degree (Penal Law § 120.05[4]; and reckless endangerment in the second degree (Penal Law § 120.20). The jury found the defendants guilty of all counts in the indictment. The Trial Justice set aside the verdict, holding that the state prosecution was preempted by the federal government's regulation of workplace safety under the Act. Additionally, the Trial Justice ruled that the evidence was

legally insufficient to support the conspiracy and reckless endangerment counts of the indictment. The Appellate Division reversed, and we now affirm.

II.

The Act was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 USC § 651). In declaring the purposes behind the Act, Congress also noted the importance of encouraging employers "to reduce the number of occupational safety and health hazards at their places of employment, and * * * to institute new and to perfect existing programs for providing safe and healthful working conditions" (29 USC § 651[b]. The Act directs the Secretary of Labor to promulgate health and safety

standards for the workplace (see, 29 USC § 655) and authorizes the Secretary to conduct inspections and investigations to ensure that employers are complying with these standards. Section 5 requires employers to comply with all standards promulgated by the Secretary of Labor and additionally imposes a general duty to "furnish to [employees] employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees (29 USC 54). The Act was not enacted for the principal purpose of punishing employers for workplace deaths or injuries; rather, "[i]t authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or

injuries from ever occurring" (Whirlpool Corp. v. Marshall, (445 US 1, 12).

The Act provides for both civil and criminal penalties for certain types of violations. These are spelled out in § 17 (29 USC § 666). In brief, willful or repeat violations of either a standard or of the general duty to provide a safe workplace are punishable by a civil penalty of not more than $10,000 (29 USC § 666[a]). Serious violations are punishable by a civil penalty of up to $1,000 for each violation (29 USC § 666[b]). A serious violation exists "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such

place of employment" (29 USC § 666[k]). Willful violations leading to the death of an employee are punishable, after conviction, by criminal fines and up to six months imprisonment.

Section 18 addresses state jurisdiction over occupational health and safety issues (29 USC § 667). Section 18(a) provides that a state is free to assert jurisdiction over such an issue if there is no federal standard already in effect (29 USC § 667[a]). Section 18(b) permits each state to submit its own plan for the development and enforcement of workplace health and safety standards to the Secretary of Labor for approval. If the state plan is approved, the state can reassume responsibility over workplace issues that are already the subject of federal standards (29 USC § 667[b]). The

Secretary cannot approve the state plan unless it is "at least as effective in providing safe and healthful employment and places of employment" as the federal standard already in place (29 USC § 667[c][2]).

The Act also contains a savings clause that addresses the continued viability of state statutory and common law duties and liabilities in light of the comprehensive federal regulatory scheme contained in the Act. Section 4(b)(4) provides:

> nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities

of em-ployers and employees under any law wich respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

(29 USC § 653[b][4]).

III.

The appellants argue that the Act's extensive scheme for regulation of occupational health and safety preempts state enforcement of general criminal laws to punish conduct that arises out of an employer's failure to provide his employees with a safe workplace. It is a well-established principle that the Supremacy Clause of the United States Constitution (Article VI, cl.2) invalidates state laws that "interfere

with, or are contrary to" federal law (Gibbons v Ogden, 9 Wheat, 1, 211). State laws can be preempted by federal regulations as well as by federal statutes (see, e.g., Hillsborough County v Automated Medical Labs., 471 US 707, 713). Federal law can preempt state law in one of three ways (see, Simpson Electric corp. v Leucadia, Inc., 72 NY2d 450, 455). First, Congress can enact legislation that expressly preempts state law by stating this intention in explicit language (see, Jones v Rath Packing Co., 430 US 519, 525). Second, "absent preemptive intent, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the

Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose'" (Fidelity Federal Savings & Loan Assn. v de la Cuesta, 458 US 141, 153, quoting Rice v Santa Fe Elevator Corp., 331 US 218, 230). Finally, federal law will be preempted by state law to the extent that it actually conflicts with federal law (see, Pacific Gas & Elec. Co. v State Energy Resources Conservation & Dev. Comm'n, 461 US 190, 204; Fidelity Federal Savings & Loan Assn. v de la Cuesta, 458 US at 153). A conflict may arise if "compliance with both federal and state

regulations is a physical impossibility" (Florida Lime & Avocado Growers v Paul, 373 US 132, 142-43), or if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (Hines v. Davidowitz, 312 US 52, 67; see also, Capital Cities Cable, Inc. v Crisp, 467 US 691, 706; Michigan Canners & Freezers Assn. v Agriculture Marketing and Bargaining Bd., 467 US 461, 478).

As a preliminary matter, we note that "[w]here * * * the field that Congress is said to have preempted has been traditionally occupied by the states * * * 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'" (Jones v Rath

Packing Co., 430 US at 525, quoting Rice v Santa Fe Elevator Corp., 331 US 218, 230; see also, Hillsborough County v Automated Medical Labs.,471 US at 715; United Automobile, Aircraft & Agricultural Implement Workers of America v Wisconsin Employment Relations Bd., 351 US 266, 273 n.11, quoting Allen-Bradley Local v Wisconsin Bd., 315 US 740, 748-49). As the United States Supreme Court has stated, "[t]he States are the natural guardians of the public against violence * * * [w]e would not interpret an Act of Congress to leave [local communities] powerless * * * without compelling directions to that effect" (United Automobile, Aircraft & Agricultural Implement Workers of America v Wisconsin Employment Relations Bd., 351 US at 274-75).

Despite the fact that federal preemption of state criminal law will not be presumed, the appellants argue that their prosecution under New York's Penal Law is both expressly and impliedly preempted by the Act. We will consider each of these contentions in turn.

Appellants argue that § 18 of the Act expressly preempts the application of state criminal law to workplace conditions that are already subject to a federal standard. As noted above, § 18(b) permits states to assume responsibility for the regulation of occupational health and safety issues by submitting a plan to the Secretary of Labor for approval. Appellants contend that because the State of New York has not submitted a plan to the Secretary, the criminal prosecution at issue here is impermissible standard-

setting that is expressly preempted by the Act.

Section 18(b), however, relates only to the development and enforcement of standards, and does not speak to state enforcement of general criminal laws. The act defines "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (29 USC § 652[8]). We do not believe that New York's general criminal laws are occupational safety and health standards as this term is used in the Act. They do not "require conditions, or the adoption or use of * * * practices, means, methods, operations, or processes."

While OSHA standards are prophylactic measures that are intended to prevent workplace accidents from ever occurring (see, Whirlpool Corp. v Marshall, 445 US 1, 12), the criminal laws of this state are triggered only after the commission of certain acts that society as a whole deems unacceptable, wherever they may occur. State criminal prosecutions lead to the imposition of penalties that reflect society's condemnation of behavior in violation of generally accepted norms (see, People v Pymm, 151 AD2d 133, 139; Note, Getting Away With Murder: Federal OSHA Preemptive of State Criminal Prosecutions for Industrial Accidents, 101 Harvard L. Rev. 535, 543). While necessarily reactive in effect, the general criminal laws of this state also serve to deter conduct that society has

labelled intolerable and morally repugnant, and in this way protect every citizen of the state. Because the Penal Law protects all citizens, including workers, and because it punishes as well as deters, we believe that the purposes behind its enforcement, while certainly consistent with the development and enforcement of OSHA standards, are sufficiently separate to warrant its continued viability in the federally regulated workplace. In addition, we believe that the very existence of § 4(b)(4), which preserves state common law and statutory rights, duties and liabilities, indicates that Congress did not intend the provisions permitting retention and assumption of state jurisdiction over workplace issues to preempt the enforcement of state criminal

laws. Therefore, having considered the broad language of the savings clause together with the presumption against preemption discussed earlier, we conclude that § 18 of the Act does not expressly preempt the enforcement of New York's Penal Law.

Appellants also argue that the state prosecution is impliedly preempted in two ways: first, because federal regulation occupies the field of occupational health and safety; and second, because enforcement of state criminal law is in conflict with the Act's comprehensive scheme for workplace regulation. They contend that the penalties imposed here are inconsistent with the penalty scheme contained in the Act and violate Congress' intent that the penalties contained in the Act be exclusive. In addition, they argue

that uniformity of workplace regulation was the primary focus of the Act and that individual state prosecutions undermine this goal, thereby conflicting with the federal regulatory scheme. Neither of these contentions has merit.

In reaching our conclusion that federal regulation of occupational health and safety does not occupy the field, we note first that the comprehensiveness of a federal statute or regulation does not necessarily indicate that Congress intended it to have preemptive effect. In New York dept. of Social Serives v. Dublino, the United States Supreme Court stated that "[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its

enactment as the exclusive means of meeting the problem" (413 US 405, 415).

The Act explicitly encourages states to "assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws" (29 USC § 651[b][11]). This alone would seem to indicate that Congress believed states should have a continuing role in the oversight of occupational health and safety concerns. Our reading of the detailed provisions for the retention and assumption of state jurisdiction over workplace issues contained in § 18 further convinces us that Congress did not intend to fill the field and preempt state regulation. Rather, it is clear that Congress intended to foster continuing state oversight over the workplace by ensuring that states

would continue to exercise jurisdiction where there was no federal standard in place and by providing that states could decide to reassert jurisdiction and impose stricter health and safety standards than those already in place by submitting a state plan to the Secretary of Labor. Section 18 carefully balances the continued importance of a state's interest in regulating workplace concerns against the need for minimum standards that ensure some level of employee health and safety.

While enforcement of the state's Penal Law in the context of workplace safety will necessarily touch upon conduct that is already subject to federal regulation under the Act, we do not find that this is impermissible or even undesirable. State prosecution of cases such as this one may cause employers to

pay stricter attention to the standards promulgated by OSHA. This we find to be entirely consistent with the Act's self-proclaimed purpose -- ensuring "safe and healthful working conditions" for American workers.

Our decision here is also consistent with the United States Supreme Court's holding in Silkwood v Kerr-McGee Corp. (464 US 238). In Silkwood, the Court considered whether its earlier holding that Congress had intended the federal government to occupy the entire field of nuclear safety (Pacific Gas & Electric Co. v State Energy Resources Conservation & development Comm'n, 461 US 190, 212) prevented an Oklahoma jury from awarding punitive damages for injuries caused by exposure to radiation at the workplace. Kerr-McGee argued that because

the state-authorized award of punitive damages punished and deterred conduct related to radiation hazards, it fell within the federally-regulated field and was therefore preempted (464 US at 249). The Supreme Court held that the award of punitive damages was not so preempted.

> [I]t is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was ell aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the

federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threat-ened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to

accept.

(464 US at 256). The case now before us presents similar concerns. The appellants here are arguing that state criminal prosecutions are preempted by the Act because they would tend to regulate conduct already subject to pervasive federal regulation. The Supreme Court in Silkwood expressly rejected this reasoning, despite the fact that it had already held that state regulation of nuclear safety issues was preempted. The Court examined the legislative history of the Price-Anderson Act and saw in it no intent to foreclose the availability of state law remedies. Similarly, our examination of the Act, especially the express language of § 4(b)(4), leads us to conclude that Congress intended state law statutory and common law duties, rights

and liabilities to survive, and that Congress was willing to tolerate any tension that resulted.

It is true that the act contains limited civil and criminal penalties for willful and repeated violations of standards or of the general duty to provide a safe workplace. That these penalties are so skeletal, however, argues against their being considered preemptive of state criminal law. While the Act imposes criminal liability for willful violations leading to the death of an employee, there is currently no provision for violations leading to serious injury. Given that promotion of worker health and safety is the primary goal of the act, it would make absolutely no sense to hold that employers who engage in willful criminal conduct, which coincidentally

constitutes a violation of an OSHA standard or of the Act's general duty clause, should be insulated from criminal prosecution simply because the culpable conduct leads to serious injury and not death. Instead, we believe that the Act's penalties operate as a floor and that states can supplement these penalties with sanctions authorized by their own criminal laws (see, People v Hegedus, 432 Mich 598, 620, 443 NW2d 128, 137; People v Chicago Magnet Wire Corp., 126 Ill2d 356, 368-69, 128 Ill Dec 517, 522, 534 NE 2d 962, 967, cert. denied sub nom Asta v Illinois, 110 S. Ct. 52; Note, Getting Away With Murder: Federal OSHA Preemtion of State Criminal Prosecutions For Industrial Accidents, supra, at 548). As noted earlier, because criminal laws are not occupational health and safety standards, states need not

comply with § 18 before being able to prosecute and impose criminal sanctions.

Having concluded that federal regulation of workplace safety does not occupy the field, we next consider appellants' arguments that state enforcement of criminal laws in the workplace conflicts with the federal scheme and is preempted for that reason. We do not accept the appellants' argument that Congress' foremost purpose in drafting the Act was to ensure uniformity of workplace health and safety standards and that individual state prosecutions stand as an obstacle to the accomplishment of that purpose. The Act's detailed provisions for the exercise of state jurisdiction over workplace concerns, when considered together with the savings clause, indicate to us that Congress was

willing to accept a multiplicity of regulatory approaches provided that the safety and health of workers were not compromised. We believe that Congress' concern was not uniformity per se; rather, it was ensuring a minimum level of workplace safety that individual states could supplement through the submission and approval of their own regulatory plans. Our reading of the Act is borne out by the legislative history of this statute (see, 116 Cong. Rec. 38,392 [statement of Rep.Karth]; 116 Cong. Rec. 37,325 [statement of Sen. Williams]; 116 Cong. Rec. 36,521 [statement of Sen. Saxbe]), which reveals that federal lawmakers were concerned in part about the "race for the bottom" that occurred when states were responsible for setting their own occupational health and safety

standards. Members of Congress, noting the inadequacy of most state efforts to regulate occupational health and safety, observed that there were distinct economic disadvantages attached to aggressive state regulation of occupational health and safety issues. Because states that had adopted stringent workplace standards would lose industry to states with less stringent standards, states had no incentive to adopt strict legislation.

In that uniformity does not appear to have been Congress' primary goal in enacting the Act, we believe that state enforcement of criminal law does not conflict with federal law by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (Hines v Davidowitz, 312 US 52, 67). In fact,

criminal prosecutions under state criminal law would seem to further the goal of ensuring the safety and health of American workers by deterring future instances of criminally culpable employer conduct. We agree with the Appellate Division that appellants' concern that an employer could fully comply with federal standards while still being subject to the Penal Law is a "hollow one" (151 AD2d 133, 140).

In addition, we do not believe that it is a physical impossibility to comply with both state and federal law in this area, which is the second ground for a finding of conflict preemption. The Act does not require an employer to engage in conduct that is prohibited by the State of New York, nor is the reverse true.

Finally, we would conclude by noting that our holding today is

consistent with decisions from the Supreme Courts of Illinois and Michigan, which have already considered this same issue (People v Hegedus, 432 Mich 598, 443 NW2d 128; People v Chicago Magnet Wire Corp., 126 Ill2d 356, 128 Ill Dec 517, 534 NE2d 962; but see, Sabine Consolidated v State, 756 SW2d 865 [Tex App].

We have considered the appellants' remaining arguments and we find them to be without merit. Accordingly, the order of the Appellate Division should be affirmed.

* * * * * * * * * * * * * * *

Order affirmed. Opinion by Chief Judge Wachtler. Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Decided October 16, 1990

At Criminal Term Part 38 of the Supreme Court of The State of New York held in the Courthouse located at 360 Adams St., Brooklyn, New York in and for the County of Kings, on the 18th day of November, 1987

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM

----------X

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiffs,

- against -

WILLIAM PYMM, EDWARD PYMM JR.,
PYMM THERMOMETER CORPORATION,
AND PAK GLASS MACHINERY CORP.

Defendants.

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ORDER

Kings County

Indictment No. 930/86

Defendants having moved this Court by motion to set aside the entire verdict of the trial jury, and such motion

having duly come on to be heard on the 13th day of November, 1987, and after argument with Albert Brackley, Esq., Attorney for Defendant William Pymm, Pymm Thermometer Corp., and Pak Glass Machinery Corp. and Louis Cohen, Esq., attorney for Edward Pymm, Jr. having appeared in support of the motion to set aside the verdict and Evan Wolfson, Esq., Assistant District Attorney of Kings County, having appeared in opposition to the motion to set aside the verdict, and all other papers and proceedings heretofore and due deliberation having been had, it is

ORDERED, that the motion to set aside the verdict is hereby granted on the ground that the People of the State of New York are preempted from prosecuting the Defendants for the crimes contained in the indictment because exclusive jurisdiction is held by the United States Government in its application of the Occupational Safety

and Health Act of 1970.

ORDERED, that the motion to set aside counts 1 and 5 of the verdict, charging conspiracy in the Fifth Degree and Reckless Endangerment in the Second Degree respectively, is hereby granted on the ground that legally sufficient evidence was not produced to support a finding of guilty on these two counts.

ENTER

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JUSTICE SUPREME COURT

Proceedings

And the law of preemption, the general doctrine says that if there's no expressed preemption, which there is not, and also no clear intent of Congress to preempt, which there is not, then the law is not preempted.

THE COURT: That's your argument?

MR. WOLFSON: In brief.

And otherwise, your Honor, we rest on the papers that we have submitted.

THE COURT: All right, I disagree with you.

Now, I just want to make a statement. There's something I want to read. The charges against the defendants in the indictment are: Conspiracy in the fifth degree, falsifying business records

in the first degree, assault in the first degree, reckless endangerment in the second degree, and assault in the second degree.

All the charges stem from the alleged concealment and failure of the defendants to report certain alleged dangerous conditions at their plant.

The other charges are the result of the defendants' alleged reckless exposure of its employees, and in particular, Vidal Rodriguez, to a dangerous substance. The exposure of Rodriguez

forms the basis of the most serious crime, assault in the first degree, under the third count.

This case presents a number of problems. One is the indictment of the defendants after they had entered into settlement with OSHA about the violations

at the plant. In so doing, the defendants had admitted liability or guilt with respect to violating the standards of OSHA.

The question presented by this fact is the propriety of the indictment in light of the civil settlement. The framing of the questions suggests the answer. This is, jeopardy did not attach, even though there was admission of liability for breaching OSHA's standards.

While the indictment justifiably raises ethical considerations, is it legal?

The second question is related to the third. In fact, it is encompassed by the third. But, for the purpose of clarification, it is set out separately. This concerns the sufficiency of the count of falsifying business records in the first degree.

Does the prosecution have the

authority to bring charges of falsifying business records under

State law, when the records allegedly falsified are those of a Federal agency?

A reading of the P.L. 175 says: "Any enterprise." And according to the prosecution, no distinction is made between Federal and local. But, the answer is, "no," in light of preemption because it's a Federal agency.

The third question is the most serious. Simply put, it is whether Federal law preempts State law in the area of workers' safety.

Now, Section 18(b) USC 667(b) of OSHA states that State law is preempted by Federal law with respect to working conditions at a particular job site, unless the State has promulgated an approved plan. New York does not have an approved plan. Can it still prosecute

violations of the OSHA act under the criminal statute?

The answer to the question is, "no."

A plan from the reading of the OSHA act is required. But, what if the conditions of the workplace not only violate OSHA's standards, but also the standards of the Penal Law of the State? In these circumstances, can the State properly prosecute the wrongdoers?

Proceedings 3764

Considerations: 1) OSHA act, despite its civil character, details a regulatory scheme that includes fines and imprisonment. Hence, violators may pay fines totalling $20,000 and imprisonment of up to one year. 29 USC 666. It should be noted that 666 contains criminal penalties. Arguably, OSHA is comprehensive in its reach.

It would seem that a state which

intends to regulate occupational safety or health matters should have an approved plan.

2) Under the Tenth Amendment, the states have the right in protecting the public safety and health. It is unclear whether occupational safety and health is a category which would fall under states' police power. If it does, it would have to comply with the terms of conditions of OSHA's act, which is expressly designed to govern the subject matter.

3) It is of some significance that the OSHA act does not specify a penalty of physical injury. But, Section 666, paragraph (i) does seem to embody serious physical injury. A strained or expansive reading of the provision does not allow for physical injury. So, arguably, there is no penalty for

physical injury.

4) Section 662 of the OSHA act does vest authority in the District Court, Federal Court, upon petition of the Secretary of Labor to adjudicate matters involving a danger which would cause death or serious physical harm. The court in the appropriate circumstances dan issue injunctive relief. The OSHA Review Commission can however, impose both civil and criminal penalties.

Section 666(g) of the OSHA act does cover the falsifying of business records.

Conclusion: Congress' intent in enacting OSHA was clearly to protect the workers' safety in the workplace. The alarming number of industrial accidents prompted this sensible piece of legislation. OSHA is comprehensive with regulation and penalties. Employers were placed on express notice as to the

required levels of safety in their places of employment.

Though expansive in its scope, OSHA did allow for a role for State authorities. Under Section 18 of the Act, states were empowered to formulate a plan to regulate working conditions in their

particular jurisdiction. That plan, however, had to be approved by Federal officials.

It is clear from the extensive nature of OSHA and the retained jurisdiction of Federal authorities over State plans with regard to workers' safety, that Congress intended the OSHA act to be the primary tool to regulate this specialized area.

The fact that the OSHA act is still followed by many states is proof that OSHA is the domineering authority in the field.

Both civil and criminal penalties are set out in the Act. The criminal penalties include imprisonment as the severest form of punishment. It is significant, that even where death is caused by an employer's willful violation of published standards, the most penalty is six months imprisonment and a fine of no more than $10,000. This would seem to indicate that Congress was well aware of two factors; those are:

1) The difficulty of proving willfulness and;

2) The large numbers of people that may be involved in any one specific case.

Moreover, trial by jury where criminal

penalties are involved, have been repeatedly rejected by the courts. So, for example, Mohawk Excavating, Inc.

versus OSHRC, number 76-4068 (2nd Cir. February 8, 1977), and Atlas Roofing Co. versus OSHRC, 424 US 964 (1976).

Thus, despite the existence of criminal penalties, the OSHA act is a civil scheme. The fact that death is the result of the employer's wrongdoing does not lessen the civil nature of OSHA.

From a broad penological perspective, the Penal Law is primarily geared to crimes against individuals, and their property. Not too infrequently, many perpetrators and victims are involved. That fact is not, however, the norm.

On the other hand, the OSHA act is intended to deal with the millions of workers in US industry. The risks and dangers they face in this technologically advanced world, are unlike those that confront them in the ugly world of the criminal. And very often, the

perpetrators of wrongs in the workplace lack knowledge of their wrongdoings.

Even when steps are taken to correct the wrongs, the hazardous substance or toxic agent

might have had an irreparable or deadly effect on the victim. Their wrongs involve the use of weapons, if you will, which have telling and sometimes uncontrollable lives of their own.

A knife or gun, on the other hand, is easily managed and controlled by the user.

Congress did intend to preempt states in the area of workers' safety and health. The extensiveness of the OSHA act serves as cast-iron proof. To hold otherwise, would be to offend and breach the letter and spirit of the OSHA act.

So, your motion to dismiss on the grounds that they're preempted and

that it should not have been brought by the State Court is granted.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

3186w
z/hu

___AD2d___ Argued - February 27, 1989

GUY J. MANGANO, J.P.
LAWRENCE J. BRACKEN
RICHARD A. BROWN
STANLEY HARWOOD, JJ.

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The People, etc., appellant, v William Pymm, Edward Pymm, Jr., Pymm Thermometer Corporation, and Pak Glass Machinery (Ind. No. 930/86)

OPINION & ORDER

APPEAL by the People from an order of the Supreme Court (Thaddeus E. Owens, J.), dated November 18, 1987, and entered in Kings County, which granted the defendants' motion to set aside a jury verdict convicting them of conspiracy in the fifth degree, falsifying business

records in the first degree, assault in the second degree, and reckless endangerment in the second degree, and dismissed the indictment.

Elizabeth Holtzman, District Attorney, Brooklyn, N.Y. (Barbara D. Underwood and Shulamit Rosenblum of counsel), and Robert Abrams, Attorney-General. New York, N.Y. (Lawrence S. Kahn and Nancy Stearns of counsel), for appellant (one brief filed).

Albert J. Brackley, Brooklyn, N.Y., and Louis D. Cohen, Brooklyn, N.Y., for respondents (one brief filed).

Berle, Kass & Case, New York, N.Y. (Michael B. Gerrard and Anne G. Weisberg of counsel), for New York Committee for Occupational Safety and Health, *amicus curiae*.

Bredhoff & Kaiser, Washington, D.C. (george H. Cohen, Robert M. Weinberg and Virginia A. Seitz of counsel), and Laurence Gold, Washington, D.C., for the American Federation of Labor and Congress of Industrial Organizations, *amicus curiae* (one brief filed).

HARWOOD, J. On this appeal the primary issue we are called upon to determine is whether the Occupational Safety and Health Act of 1970 (hereinafter OSHA) (29 USC § 651, *et seq.*) pre-empts the State, in the absence of approval from OSHA officials, from prosecuting the defendants for conduct which is regulated by OSHA. We conclude that it does not and therefore reverse the order setting aside the jury verdict.

The corporate defendants, Pymm Thermometer Corporation (hereinafter PTC) and Pak Glass Machinery Corporation (hereinafter Pak Glass), were New York corporations operating out of the same building in Brooklyn, New York. PTC's principal business was manufacturing thermometers, but it was also involved with reclaiming mercury from broken

thermometers. Its mercury reclamation system was housed in the cellar of the building, the only access to which was a door, separate from the main entrance, leading directly to the cellar from outside the building. Pak Glass manufactured, serviced and repaired the machinery used by PTC. The individual defendants were actual or de facto principals or officers of the corporate defendants.

The indictment charged the defendants with (1) conspiring to commit the crime of falsifying business records in the first degree by hiding from OSHA inspectors the existence of the cellar reclamation project, (2) falsifying business records in the first degree by preventing the making of a true entry concerning the existence of the cellar

reclamation project and, with intent to defraud, including the intent to conceal the crime of reckless endangerment, causing the omission thereof in the business records of an enterprise, namely OSHA, (3) assault in the first degree in that defendants, in the course of and in furtherance of the commission of a felony, i.e., the crime of falsifying business records in the first degree, caused serious physical injury to Vidal Rodriguez, a former employee of PTC, (4) assault in the second degree in that defendants recklessly caused serious physical injury to Vidal Rodriguez by means of a dangerous instrument, i.e., mercury, and (5) reckless endangerment in the second degree in that the defendants recklessly engaged in conduct which created a substantial risk of serious

physical injury to the employees of PTC and Pak Glass.

After a jury trial in which the jury found the defendants guilty on all counts of the indictment, the Trial Justice set aside the verdict and dismissed the indictment. The court held that:

> "the People of the State of New York are pre-empted from prosecuting the Defendants for the crimes contained in the indictment because exclusive jurisdiction is held by the United States Government in its application of the Occupational Safety and Health Act of 1970".

It also ruled that the evidence was legally insufficient to support the conspiracy and reckless endangerment

counts of the indictment. We conclude these rulings were erroneous.

Congress enacted OSHA "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources" (*see*, 29 USC § 651[b]). The legislation's orientation is prophylactic in nature (*see, Atlas Roofing Co. v Occupational Safety & Health Rev. Commn.*, 430 US 442, 444-445) and it thus "authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring" (*Whirlpool Corp. v. Marshall*, 445 US 1, 12).

An occupational safety and health standard is a standard "which requires conditions, or the adoption or

use of one or more practices, means, methods, operation, or process, reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (29 USC § 652[8]). Employers are required to comply with specific OSHA standards and to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (29 USC § 654[a][1]). For violations of specific OSHA standards promulgated under 29 USC § 654(a), OSHA authorizes the imposition of civil fines ranging from $1,000 to $10,000 (29 USC §§ 666[a-c]). Criminal fines of $1,000 may be imposed for giving unauthorized advance notification of an OSHA inspection and criminal fines of $10,000 and prison terms of up to six months for knowingly making false October 23, 1989 Page 8.

statements on any OSHA filing (*see*, 29 USC §§ 666[f], [g]). OSHA also provides for criminal fines of $10,000 and prison terms of up to six months for willful violations of OSHA standards that result in an employee's death, and fines of $20,000 and prison terms of up to one year for a second offense (*see*, 29 USC § 666[e]). OSHA specifically permits any State to assert jurisdiction over any occupational safety or health issue with respect to which no Federal standard is in effect (see 29 USC § 667[a]). Moreover, any State which desires to assume responsibility for development and enforcement of occupational safety and health standards with respect to which a Federal standard is in effect may apply for such authority by following the procedures set forth in 29 USC § 667 (*see*,

29 USC § 667[b]).

We note at the outset of our analysis of whether Congress intended by its enactment of OSHA to pre-empt use of State criminal law in the workplace that there is a presumption against such pre-emption (*see, Hillsborough County v Automated Med. Labs.*, 471 US 707, 715; *Pacific Gas & Elec. Co. v State Energy Res. Cons. & Dev. Commn.*, 461 US 190, 206; *Environmental Encapsulating Corp. v City of New York, 855 F2d 48; State ex rel. Cornellier v Black*, 144 Wis 2d 745, 425 NW2d 21). Regulation of matters related to health and safety and the power to prosecute criminal conduct have traditionally been regarded as properly within the scope of State superintendence (*see, Hillsborough County v Automated Med. Labs., supra; People v Chicago Magnet Wire*

Corp.,126 Ill 2d 356, 534 NE2d 962) and where the regulated activity touches interests which are "deeply rooted in local feeling and responsibility", a State will not be deprived of jurisdiction absent compelling congressional direction (*Farmer v United Brotherhood of Carpenters & Joiners*, 430 US 290, 296-297; *see also, Brown v Hotel Employees Intl. Union Local 54*, 468 US 494; *State ex rel. Cornellier v Black, supra*).

The presumption against pre-emption of the State's police power can be overcome only if pre-emption was the clear and manifest purpose of Congress (*see, Pacific Gas & Elec. Co. v State Energy Res. Cons. & Dev. Commn., supra*, at 206), although that intent may be demonstrated in several ways (*see generally, Hillbrough County v Automated Medical Laboratories,*

supra, at 712-713;*Pacific Gas & Elec. Co. v State Energy Res. Cons. & Dev. Common, Supra)*. Congress may express its intent to pre-empt State law by explicit statement within the statute (*see, Jones v Rath Packing Co.*, 430 US 519, 525; *Environmental Encapsulating Corp. v City of New York, supra*). Or, where Federal legislation contains no express pre-emption language but is nonetheless so comprehensive in a given area as to leave no room for supplemental legislation, pre-emption will be implied (*International Paper Co. v Ouellete*, 479 US 481; *Environmental Encapsulating Corp. v City of New York, supra)*. Moreover, even where Congress has not entirely displaced State action, State law is pre-empted to the extent that it actually conflicts with Federal law. Such a conflict is found

where compliance with both Federal and State regulations is a physical impossibility (*see, Florida Lime & Avocado Growers v Paul*, 373 US 132, 142-143; *Environmental Encapsulating Corp. v City of New York, supra*). However, pre-emption does not automatically result simply because the conduct prohibited by State law is identical to conduct subject to Federal regulation (*cf., Sears, Roebuck & Co. v San Diego County District Council of Carpenters*, 436 US 180; *see, People v Chicago Magnet Wire Corp., supra*) and in most fields of activity, the United States Supreme Court has refused to find Federal pre-emption of State law absent either a clear statutory proscription or a direct conflict between Federal and State law (*Boyle v United Technologies Corp.*,_____ US _____, 108 S Ct 2510, 2513).

As has been noted, 29 USC § 667provides that states are not prevented from asserting jurisdiction over any "occupational safety or health issue" with respect to which no Federal "standard" is in effect (*see*, 29 USC § 667[a]). It also permits a State to assume responsibility, by way of a Federally-approved plan, for development and enforcement of occupational safety and health standard (*see*, 29 USC § 667[b]). The defendants contend that these provisions constitute an explicit pronouncement by Congress of its intent that, absent Federal approval, the District Attorney is here precluded from prosecuting them on account of conduct violative of this State's Penal Law because the conduct occurred in the workplace where Federal safety standards are also applicable. Like several of our

sister states (see, People v Hegedus, _____ Mich _____ [July 3, 1989]; *People v Chicago Magnet Wire Corp.* 126 Il12d 386, *supra; see also, Environmental Encapsulating Corp. v City of New York*, 885 F2d 48, *supra; but cf., Sabine Consol. Inc. v State*, 756 SW2d 865 [Tex. Ct. App., 1988], we decline to so construe 29 USC § 667.

In rejecting the contention that pre-emption is explicitly set forth in 29 USC § 667, the Supreme Court of Illinois observed that "[n]owhere in [§ 667] is there a statement or suggestion that the enforcement of State criminal law as to federally regulated workplace matters is pre-empted unless approval is obtained from OSHA officials" (*People v Chicago Magnet Wire. Corp., supra* at 965). As noted by the Supreme Court of Michigan, 29

USC § 667 has the effect of "*preserving* state jurisdiction over safety and health issues with respect to which no federal standard exists" (*People v Hegedus, supra*, slip opn at 10) and of limiting the requirement of Federal approval to instances where a State assumes responsibility for development and enforcement of workplace health and safety "standards" which would otherwise be a Federal responsibility (*People v Hegedus, supra*, slip opn at 10). We note there is nothing in the statute's definition of "occupational safety and health standards" (*see*, 29 USC § 652[8]) to indicate that, by its reference in 29 USC § 667 to occupational safety and health standards. Congress intended that State enforcement of its criminal law standards be pre-empted by or subsumed in OSHA (*see*, Note,

Getting Away With Murder: Federal OSHA Pre-emption of State Criminal Prosecution for Industrial Accidents, 101 Harv L Rev 535, 542 [1987]; *see also, People v Hegedus, supra*). Indeed, while OSHA standards are designed to be prophylactic (*see, Whirlpool Corp. v Marshall*, 445 US 1, *supra*), State criminal laws are meant to be reactive (*see*, Note, *Getting Away With Murder: Federal OSHA Pre-emption of State Criminal Prosecution for Industrial Accidents*, 101 Harv L Rev 535, 548 [1987]; *People v Hegedus, supra*). Although sanctions under state penal laws may effect a "regulation" of workplace conduct, the New York Penal Law has a legitimate and substantial purpose apart from protecting workers (*see, Environmental Encapsulating Corp. v City of New York, supra; People v Hegedus.*

supra; People v Chicago Magnet Wire Corp., supra, at 966), i.e., punishing violation of general societal norms. We therefore reject the defendants' virtual equation of criminal law standards with occupational safety regulatory norms, an equation necessary to support the argument that Congress, by its enactment of 29 USC § 667, explicitly set forth that it intended to pre-empt a State's enforcement of its criminal laws.

Nor can we agree with the defendants that OSHA is so comprehensive and complex that Congress has effectuated pre-emption by implication. While OSHA does contain an array of civil and criminal penalties, there are no significant criminal sanctions for violations causing nonfatal injuries (*see*, Note, *Getting Away With Murder: Federal*

OSHA Pre-emption of State Criminal Prosecution for Industrial Accidents, 101 Harv L Rev 535, 548 [1987]). Even the most egregious conduct, i.e., willful violation of OSHA standards which results in an employee's death, warrants a penalty of incarceration for no more than six months for a first offense.

It was not fear that states would apply health and safety standards and penalties more stringent than those promulgated pursuant to OSHA which prompted Congress to act. Its concern was rather that states would apply lesser safety and health standards for the workplace (*see, People v Chicago Magnet Wire Corp. supra*. It is therefore unlikely that Congress would enact legislation which is designed to increase protection for workers by effectively

eliminating meaningful punishment for even egregiously harmful conduct (*see, People v Chicago Magnet Wire Corp., supra* at 967; *see also,* Note, *Getting Away With Murder:* Federal OSHA *Pre-emption of State Criminal Prosecution for Industrial Accidents*, 101 Harv L Rev 535, 548 [1987]). It is thus apparent that OSHA is not so comprehensive as to constitute an expression of Congressional intent to pre-empt enforcement of State criminal law. Moreover, that OSHA regulations are complex and extensive is merely a reflection of the complexity of the subject matter rather than an expression of an intent by Congress that all aspects of workplace safety and health become an exclusively Federal concern (*see,* Note, *Getting Away With Murder: Federal* OSHA *Pre-emption of State Criminal Prosecution*

for Industrial Accidents, 101 Harv L Rev 535, 547 [1987]).

With respect to whether State criminal law conflicts with OSHA, the defendants' concern that an employer could be in total compliance with OSHA but nonetheless violate State Penal Law is a hollow one. Because OSHA sets a floor rather than a ceiling for occupational safety and health standards (*see*, 29 USC § 667[c][2], [3]; *cf.*, *People v Chicago Magnet Wire Corp.*, *supra*, at 967; *see also*, *People v Hegedus*, *supra*, at 25), and assuming there could be instances where an employer observes OSHA standards yet intentionally or recklessly subjects his employees to harmful working conditions, criminal prosecution may be fully appropriate. The salutory purpose of OSHA is better served by reserving to the

states the separate power of criminal prosecution as an additional vehicle for assuring a safe and healthful workplace (*see*, Note, *Getting Away With Murder: Federal* OSHA *Pre-emption of State Criminal Prosecution for Industrial Accidents*, 101 Harv L Rev 535, 549 [1987]. It thus appears that the goals of State criminal law complement rather than conflict with OSHA so as to ensure that workers are adequately protected and that particularly egregious conduct receives appropriate punishment.

The foregoing compels the conclusion that Supreme Court erred when it ruled that State prosecution of defendants for criminal conduct committed at their workplace is pre-empted by OSHA. Moreover, we cannot agree with the Supreme Court that the evidence was legally

insufficient to sustain the conspiracy and reckless endangerment counts of the indictment, the only two counts with respect to which the Supreme Court so ruled. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d), we find the evidence, both circumstantial and direct, was legally sufficient to establish beyond a reasonable doubt that the defendants agreed to prevent OSHA inspectors from learning of the mercury reclamation project so as to prevent them from making true entries in OSHA business records and so as to conceal the criminal harm done to PTC and Pak Glass employees (*see*, Penal Law §§ 105.5, 175.10; *see also, Matter of Perlmutter*, 141 AD2d 253, 256-258; *People v Coe*, 131 Misc 2d 807, 812, *afd* 126 AD2d, 436, *afd* 71 NY2d 852, 856). The evidence

was also legally sufficient to establish beyond a reasonable doubt that, by the manner in which they conducted their business, the defendants recklessly created a substantial risk that employees would suffer serious physical injury (*see*, Penal Law § 120.20). Accordingly, the order setting aside the verdict is reversed, on the law, the defendants' motion is denied, the jury verdict is reinstated, and the matter is remitted to Supreme Court, Kings County, for sentencing.

MANGANO, J.P., BRACKEN and BROWN, JJ., concur.

ORDERED that the order is reversed, on the law, the defendants' motion is denied, the jury verdict is

reinstated, and the matter is remitted to the Supreme Court, Kings County, for sentencing.

ENTER:

Martin H. Brownstein

Clerk

APPENDIX

Penal Law of the State of New York

SECTION 105.05, Conspiracy in the Fifth Degree

A person is guilty of conspiracy in the fifth degree when, with intent that conduct constituting:

1. a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct; or

2. a crime be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause performance of such conduct.

Conspiracy in the fifth degree is a class A misdemeanor.

SECTION 120.05, Assault in the Second Degree

A person is guilty of assault in the second degree when:

4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the second degree is a class D felony.

SECTION 120.10, Assault in the First Degree

A person is guilty of assault in the first degree when:

4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he or another participant if there be any, causes serious physical injury to a person other than one of the participants.

Assault in the first degree is a class C felony.

SECTION 120,20, Reckless Endangerment in the Second Degree

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Reckless endangerment in the second degree is a class A misdemeanor.

SECTION 175.10, Falsifying Business Records in the First Degree

A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof.

Falsifying business records in the first degree is a class E felony.

No. 90-847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM PYMM, EDWARD PYMM, JR., PYMM THERMOMETER CORPORATION, AND PAK GLASS MACHINERY CORPORATION,

Petitioners,

—VS.—

STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, preempts state criminal prosecution, pursuant to laws of general application, of crimes committed against workers in the workplace?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Statutes:

Other Authorities:

PAGE

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the New York Court of Appeals opinion in this case. That opinion is reported at 76 N.Y.2d 511, 561 N.Y.S.2d 687, 563 N.E.2d 1 (1990).

STATEMENT OF FACTS

From the early 1970's, petitioners Pymm Thermometer Corporation (PTC), Pak-Glass Machinery Corporation (Pak-Glass), and William and Edward Pymm, Jr. were repeatedly warned by state and federal agencies about the extreme

dangers of mercury and the precautions necessary to protect workers from mercury poisoning. Nevertheless, petitioners continued for fifteen years to expose workers at their thermometer manufacturing plant to excessively high concentrations of mercury vapor in the air, risking damage to the workers' brains, kidneys, and other vital organs and body systems. Opinion at 3-5.[1]

Petitioners' operation was housed in a two-story building in Brooklyn, New York. The individual defendants were officers of PTC and were responsible for daily management and supervision of the plant's operations. PTC manufactured thermometers for clinical use on the second floor of the plant. Pak-Glass made, serviced, and repaired the machinery used at PTC and was located on the first floor of the same building, at ground level. *Id.* at 2-3. Between 1981 and 1985, eighty to a hundred people worked in the plant.

Contrary to petitioners' contentions, the conditions on petitioners' main manufacturing floor were not in compliance with regulations of the Occupational Safety and Health Administration (OSHA) from January, 1981 to October, 1985. During that period, OSHA inspected the plant at least four times and issued numerous citations for violations of OSHA standards and regulations in 1981 and 1985. In 1981, petitioners were cited for exposing their workers on the manufacturing floor to mercury vapor concentrations averaging double the permissible OSHA level. They were also warned about the inadequacy of ventilation, the absence of personal protective equipment, and the need to warn and train workers regarding the dangers of mercury. *Id.* at 5-6. For over four years, petitioners did little or nothing to cure the violations or to comply with OSHA's suggestions. Thus, during an OSHA inspection ending in March, 1985, OSHA cited petitioners for poor housekeeping, exposing workers to mer-

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1 The opinion of the court below has been reproduced by petitioners as the first document in the Appendix to their Petition. Citations to "Opinion at _____" are references to the opinion as reproduced in the Appendix.

cury vapor in excess of the permissible OSHA level, failing to furnish feasible engineering controls, and permitting a worker to eat in the work area. *Id.*

Already aware of the dangerous conditions on their main manufacturing floor, petitioners created and maintained even worse conditions in a cellar mercury-reclamation operation, starting in April, 1983. In order to salvage some of the valuable mercury it had been wasting in its above-ground manufacturing process, PTC constructed a crushing machine which ground up broken and defective thermometers, spewing mercury-laden dust into the face of the machine operator. The machine was housed in a windowless, underventilated cellar, where petitioners stored boxes leaking mercury from the broken and faulty thermometers. *Id.* at 6-7.

Into this extremely hazardous operation, petitioners sent several workers, including Vidal Rodriguez. When Mr. Rodriguez began working for petitioners in 1981, he was a strong and healthy man of forty-five. R. 2097-98, 2688, 2693.* After about two years of working as a cleanup and handy man on the manufacturing floor, where he was exposed to high concentrations of mercury vapors from the action of cleaning solvents and from sweeping up mercury droplets, he began suffering the ill effects of mercury. His knees ached, he had difficulty sleeping, he became irritable, he suffered headaches and dizziness, and he needed a cane to walk the one and a half blocks from home to work. R. 2104-6, 2683, 2686-88. After working in the cellar, Mr. Rodriguez's injuries worsened considerably. The damage to his brain had become irreparable. Opinion at 7-8.

The severity of Mr. Rodriguez's injury was the result of his daily exposure, for approximately six hours a day, over an eleven month period, to the especially high concentrations of mercury vapor in the cellar, after he had been previously overexposed while working on the main factory floor. While other workers were exposed to similar dangers, the evidence

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* Citations to R. _____ are references to the minutes of trial, as originally paginated, which are part of the record in the Court of Appeals.

showed that they were not seriously injured because none of them spent as much time in the cellar as Mr. Rodriguez; none were exposed in the same manner as Mr. Rodriguez.

When Mr. Rodriguez asked petitioners about any possible dangers of working with mercury, they lied to him, telling him mercury was not dangerous to people. R. 2106-7. They provided no training for any of their workers and refused to supply Mr. Rodriguez and others with protective clothing and other safety equipment.

In June, 1984, Mr. Rodriguez injured his arm at work. While being treated for his injury, he learned from the physician who treated him that many of the symptoms the petitioners had been attributing to his alleged old age were, instead, the results of mercury poisoning from exposure in petitioners' plant. R. 2691, 2877, 2894, 2898. When Mr. Rodriguez returned to work after a two week course of hospital treatment for mercury poisoning and asked petitioners to fill out his workers' compensation form, which included a claim for mercury poisoning, petitioners fired him on the spot. R. 2692-94, 2892-94.

While Mr. Rodriguez and other workers labored in the cellar mercury reclamation operation (from approximately April, 1983 to October, 1985), at least two OSHA inspections took place. Petitioners hid the existence of this operation from OSHA and from other governmental agencies which came to their plant, by lying about areas in which mercury was used, by omitting the cellar from purportedly complete tours of all the work areas at PTC, and by closing the operation temporarily during inspections. Consequently, OSHA did not learn about the cellar operation or have an opportunity to inspect it or take measurements to determine air mercury vapor concentrations while workers were there. Opinion at 6-7. In fact, OSHA learned of the existence of the reclamation operation by happenstance. In October, 1985, Mr. Rodriguez found the inspectors on the street during their lunch break and told them about the cellar. R. 255-58, 1837-39.

When the inspectors then asked petitioners about the cellar, petitioners lied about its existence, tried to prevent OSHA inspectors from measuring the mercury vapor levels in the cellar, and performed a massive cleanup to conceal the conditions under which the workers had labored. R. 265-68, 270-71, 314-15. Expert testimony, including that of a Professor of Environmental Engineering at Harvard University, established that the mercury vapor breathed by Vidal Rodriguez and other workers was approximately fifty times the OSHA limit. R. 497, 554.

After Mr. Rodriguez's illness was discovered, the New York City Department of Health examined other workers in petitioners' plant. Contrary to petitioners' apparent claim to this Court (Petition at 22), tests revealed that over half of the workers in the plant in October, 1984 had urine mercury levels considered hazardous by OSHA, including about twenty percent who had levels which mandated their immediate removal from exposure. R. 1115-17. Mr. Rodriguez had mercury urine levels three times as high as those OSHA considered hazardous. R. 1233A-7, 1301.

In addition, expert medical evidence offered at trial established that Mr. Rodriguez suffered permanent damage to his central and peripheral nervous systems. Opinion at 7-8. Among the experts who testified at trial were doctors who conducted objective neurophysiological tests on Mr. Rodriguez at Boston University Hospital in April, 1986. What most impressed the team that examined Mr. Rodriguez were the "holes" in his brain that they saw in its magnetic resonance image. R. 2620, 2638. Every medical expert who examined or treated Mr. Rodriguez agreed that there was no explanation for Mr. Rodriguez's illness other than mercury vapor poisoning due to exposure at petitioners' plant. Opinion at 7-8.

On the basis of these and other facts, the jury convicted petitioners of Conspiracy in the Fifth Degree (New York Penal Law § 105.05 (1) and Falsifying Business Records in the First Degree (New York Penal Law § 175.10) for conspir-

ing to conceal the existence of the cellar operation and thereby causing OSHA to make inaccurate reports; Assault in the First Degree (New York Penal Law § 120.10(4)) for the infliction of serious physical injury to Mr. Rodriguez in the course and furtherance of the felony of Falsifying Business Records in the First Degree (New York Penal Law § 175.10); Assault in the Second Degree (New York Penal Law § 120.05(4)) for recklessly inflicting serious physical injury upon Mr. Rodriguez with a dangerous instrument, namely, mercury; and Reckless Endangerment in the Second Degree (New York Penal Law § 120.20) for creating a substantial risk of serious physical injury to all of the workers in the plant.

The trial court set aside the verdict on the ground that the Occupational Safety and Health Act of 1970 (OSH Act) preempted New York State from prosecuting petitioners for violations of New York State Penal Law. The New York State Supreme Court, Appellate Division, Second Department, reversed the trial court's decision and reinstated the verdict. *People v. Pymm*, 151 A.D.2d 133, 546 N.Y.S.2d 871 (2d Dep't 1989).

The New York Court of Appeals unanimously affirmed the order of the Appellate Division, holding that the OSH Act does not preempt the State of New York from providing New York workers the same protections under criminal law as other citizens, and that the state may prosecute a corporation and its officers for crimes against their workers. *People v. Pymm*, 76 N.Y.2d 511, 561 N.Y.S.2d 687, 563 N.E.2d 1 (1990). The court also rejected petitioners' contention, repeated in their petition to this Court, that it was a "physical impossibility" to comply with New York State and federal law in this area. "The [OSH] Act does not require an employer to engage in conduct that is prohibited by the State of New York, nor is the reverse true." Opinion at 36. In so ruling, the court below noted that the highest courts of Illinois and Michigan had also held that state criminal law is not preempted by the OSH Act. *Id.* at 37 (citing *People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 128 Ill Dec. 517,

534 N.E.2d 962, *cert. denied*, ____ U.S. ____, 110 S.Ct. 52 (1989); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989)).

REASONS WHY THE PETITION SHOULD BE DENIED

The petition for a writ of certiorari should be denied because the New York Court of Appeals correctly applied well-understood principles relating to the Supremacy Clause of the United States Constitution and the power of Congress to preempt state law. Moreover, this record does not present the issue petitioners posit. Petitioners have presented this case to the Court as involving a state criminal prosecution for conduct and conditions that complied with the OSH Act standards and requirements. They insist that the prosecution's case rested on speculation and that the evidence of violations of OSHA standards and injury to their employee was insufficient and subjective. These assertions distort both the record below and the basis for the decision of the Court of Appeals.

Here petitioners' conduct not only egregiously violated OSHA regulations, but also deviated dramatically from any reasonable standard of care owed by members of society to each other. As a result, according to expert and other objective evidence offered at trial, petitioners caused serious brain damage to one employee and gravely endangered other workers. It was on the basis of this record that the Court of Appeals held that this prosecution, pursuant to state criminal laws of general application, was not preempted by the OSH Act. This decision is supported by the language and legislative history of the OSH Act and by the decisions of this Court upon which the Court of Appeals relied. It is also consistent with the decisions of the highest courts of the other states that have considered this issue.

1. The ruling of the New York Court of Appeals is consistent with the rulings of this Court regarding preemption.

Congressional intent is "the ultimate touchstone" in determining preemption. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). The purpose of Congress in enacting the OSH Act was to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). The Act was the response to what Congress described as a "grim current scene" in which industrial accidents and illnesses due to occupational toxic exposures were resulting in ever increasing human misery and economic loss. S. Rep. No. 91-1218, 91st Cong. 2nd Sess. (1970), *reprinted in Legislative History of the Occupational Safety and Health Act of 1970*, Committee Print, 92nd Cong. 1st Sess., June 1971, at 142 (hereinafter, *Legislative History*).

In order to accomplish its purpose of assuring a safe and healthful workplace, Congress established a regulatory program, the primary focus of which was to prevent injuries in advance, rather than to penalize employers for past conduct or to compensate injured workers. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980); *Hegedus*, 432 Mich. at 604, 443 N.W. 2d at 129; *see also* Note, *Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 537 (1987). The regulatory program is based both on the General Duty Clause, which requires that employers provide employees a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm", Section 5, 29 U.S.C. § 654, and detailed standards promulgated by the Secretary of Labor, pursuant to Section 6 of the OSH Act, 29 U.S.C. § 655. The OSH Act was "to assure minimum—but not necessarily uniform—occupational health and safety standards." *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 59 (2d Cir. 1988).

> The fact that states are encouraged in the first section of the act to develop their own occupational safety and

> health standards subject only to the condition in § 18(c)(2) that they be "at least as effective" as the federal standards, indicates that Congress was not primarily concerned with uniformity but rather intended the federal act to provide a kind of "floor" of protection to employees.

Hegedus, 432 Mich. at 622, 443 N.W.2d at 138. Furthermore, the regulatory program was expressly intended to coexist with state common law and statutes relating to "injuries, diseases or death of employees arising out of, or in the course of employment." 29 U.S.C. § 653(b)(4).[2]

Although the Act does contain limited penalties, Congress did not intend to supplant the states in the use of their criminal powers. To the contrary, by enacting the OSH Act, Congress created a complex scheme which reserves substantial authority for the states outside of the regulatory sphere, including the authority to apply their penal laws where they have been violated.

In holding that New York State can exercise its police power to prosecute crimes against workers under the Penal Law, the Court of Appeals correctly applied and relied upon the rulings of this Court governing preemption. As the Court of Appeals preliminarily noted,

> "[w]here . . . the field that Congress is said to have preempted has been traditionally occupied by the states . . . 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "

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2 Section 4(b)(4) provides:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

29 U.S.C. § 653 (b)(4).

Opinion at 17-18 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Such clear and manifest purpose to preempt is entirely absent from the OSH Act. That absence is fatal to petitioners' claim in light of the states' predominant historical interest in regulating health and safety matters. *Hillsborough Co. v. Automated Medical Labs, Inc.*, 471 U.S. 707, 719 (1985).

a. The OSH Act does not expressly preempt New York State Penal Law.

Congress can preempt state law by stating such an intention in explicit language. *Jones v. Rath Packing Co.*, 430 U.S. at 525. The court below correctly rejected petitioners' contention that Section 18(a) of the OSH Act, 29 U.S.C. § 667(a), expressly preempts New York State penal law. Section 18(a) provides:

> Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under state law over any occupational safety and health issue with respect to which no standard is in effect under section 655 of this title.

29 U.S.C. § 667(a).

The court concluded that Congress only intended to preempt states from imposing their own occupational safety and health standards, and that a prosecution under New York's penal law of general application does not constitute the imposition of such standards.[3] Opinion at 20. Relying on this Court's opinion in *Whirlpool Corp. v. Marshall*, 445 U.S. at 12, the court noted that OSHA standards are "prophylactic measures that are intended to prevent workplace accidents from ever occurring," while state criminal law is triggered

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3 A standard is defined in the OSH Act as:

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

29 U.S.C. § 652(8).

after the fact by the commission of acts which "the society as a whole deems unacceptable, wherever they may occur." Opinion at 21. Criminal law imposes penalties "that reflect society's condemnation of behavior in violation of generally accepted norms," and serves "to deter conduct that society has labelled intolerable and morally repugnant, and in this way protect every citizen of the state." Opinion, at 21-22. *See also Chicago Magnet Wire*, 126 Ill. 2d at 366, 534 N.W.2d at 966 (1989); *Hegedus*, 432 Mich. at 610, 443 N.W.2d at 132; Note, *Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. at 543.

In addition, the OSH Act contains a savings clause which preserves state common law and statutory rights, duties and liabilities of employers and employees with respect to injury, diseases and death of workers. Section 4(b)(4), 29 U.S.C. § 653(b)(4). As the court below recognized, the savings clause, when viewed in the context of the broad presumption against preemption, demonstrates that Congress did not intend Section 18 of the Act to preempt state penal laws. Opinion at 22-23. *See also Hegedus*, 432 Mich. at 167, 443 N.W.2d at 135.

b. The OSH Act does not impliedly preempt New York State penal law.

Even when federal preemption is not explicit, it may be implied where there is "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it" because Congress intended to dominate the field. *Pacific Gas and Electric Co. v. State Energy Resource Conservation and Dev. Comm'n.*, 461 U.S. 190, 203 (1983) (quoting *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153 (1982)); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Here, however, as the court below properly found, the federal statutory scheme was "intended to foster continuing state oversight over the workplace. . . ." Opinion at 25.

i. The OSH Act does not occupy the field of workplace safety and health.

As the Court of Appeals concluded, by enacting the OSH Act, Congress did not intend the federal government to occupy the field of workplace safety and health. Rather, Congress intended the states to remain deeply involved in ensuring the health of workers. As the court observed, "[t]he Act explicitly encourages states to 'assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws' (29 U.S.C. § 651(b)(11))." Opinion at 25. *See also Hegedus*, 432 Mich. at 619, 443 N.W. 2d at 136; *Chicago Magnet Wire*, 126 Ill. 2d at 367-8, 534 N.W. 2d at 966-7. In addition, Section 18 of the OSH Act specifically permits the states to assume responsibility for enforcement of occupational safety and health standards by adopting a "state plan", and to adopt standards which are more stringent than the federal standards. 29 U.S.C. § 667(b).

The court below also relied on the legislative history of the OSH Act which reaffirms that Congress intended that the states would remain involved in insuring workplace safety and health and that the states could supplement federal minimum safety standards. Opinion at 33-34 (citing Statement of Rep. Karth, 116 Cong. Rec. 38,392 (Nov. 23, 1970); Statement of Sen. Williams, 116 Cong. Rec. 37,325 (Nov. 16, 1970); Statement of Sen. Saxbe, 116 Cong. Rec. 36,521 (Oct. 13, 1970)); *see also* Statement of Rep. Gaydos, *reprinted in* Legislative History at p. 1035.

While it is true Congress intended to create a comprehensive nationwide approach, *Legislative History* at 144, that approach was to provide ". . . a floor of federal standards which the States can build upon." Statement of Sen. Saxbe, *Legislative History* at 297. Furthermore, while Congress may have expressed concern that conscientious employers might be at a competitive disadvantage, Petition at 4, the federal regulatory "floor" was created not out of a concern about the burdens on employers from multiple states laws, but rather to

ensure that those states that were vigorously protecting the health and safety of their workers would not be disadvantaged. *United Steelworkers of America v. Auchter*, 763 F.2d 728, 734 (3rd Cir. 1985). The court therefore correctly rejected petitioners' contention that Congress intended to create uniform safety standards. Petition at 30-31.

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984), relied upon by the court below, makes clear that state penal law is not preempted even when enforcement of that law would touch upon conduct that is already regulated by federal law and might have an indirect regulatory impact. In *Silkwood*, this Court upheld an award of punitive damages pursuant to state law despite its indirect regulatory impact on conduct over which the Nuclear Regulatory Commission had exclusive regulatory authority. 464 U.S. at 256. As the Illinois Supreme Court stated in *Chicago Magnet Wire*:

> There is little if any difference in the regulatory effect of punitive damages in tort and criminal penalties under the criminal law. (See Restatement (Second) of Torts § 908, comment b (1970)). We see no reason, therefore, why what the Court declared in *Silkwood* should not be applied to the preemptive effect of OSHA. Also, if Congress, in OSHA, explicitly declared it was willing to accept the incidental regulation imposed by compensatory damages awards under State tort law, it cannot plausibly be argued that it also intended to preempt State criminal law because of its incidental regulatory effect on workplace safety.

126 Ill.2d at 370-71, 534 N.E.2d at 968.

Finally, the Court of Appeals properly rejected petitioners' contentions that permitting the application of state penal law would conflict with the penalty structure established by Congress in the OSH Act. The Act relies primarily on civil, and has only limited criminal penalties.[4] This is not surprising in

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4 The OSH Act contains criminal penalties only for giving advance notice of inspections, making false statements, or for willful violations

light of the prophylactic nature of the Act. *Whirlpool Corp. v. Marshall*, 445 U.S. at 12. Thus the court below concluded that the very fact that ". . . the penalties are so skeletal . . . argues against their being considered preemptive of state criminal law." Opinion at 31; *see also Hegedus*, 432 Mich. at 624, 443 N.W.2d at 138.

ii. New York State penal law does not conflict with the purpose of the OSH Act.

Even where state law is not expressly or impliedly preempted, it may be preempted when it actually conflicts with federal law and it is impossible to comply with both state and federal law, or where it stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Pacific Gas and Elec.*, 461 U.S. at 204; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-3 (1963).

Since Congress did not intend to mandate complete uniformity in the field of occupational safety and health, the court properly rejected petitioners' contention that the application of state criminal law conflicts with the purpose of the OSH Act. Opinion at 33. Rather, as the court found, the use of state penal law is not merely consistent with, but in furtherance of ". . . the Act's self-proclaimed purpose—ensuring 'safe and healthful working conditions' for American workers" *Id.* at 27, and neither federal nor state law requires an employer to engage in any conduct which is prohibited by the law of the other government. *Id.* at 36.

Petitioners claim that if the opinion below is permitted to stand, ". . . employers (such as petitioners) who comply with the OSH Act standards [can] become subject to local prosecution." Petition at 34. The Court of Appeals, however, found that rather than being in compliance with OSH Act standards, the petitioners had an on-going problem of

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causing the death of a worker. 29 U.S.C. § 666(e)-(g). There is no criminal penalty for violations (willful or otherwise) which cause serious physical injury or illness or even the complete incapacity of a worker.

mercury contamination at their factory which posed a risk of health to their employees and violated OSHA standards and regulations. Opinion at 3, 5-6. As the Court of Appeals and the Appellate Division both found, petitioners' claim that they could be prosecuted under State law despite compliance with federal law is "a hollow one." Opinion at 36.

2. The ruling of the New York Court of Appeals is in accord with the rulings of the highest courts of all other states which have considered the question.

The question of whether the OSH Act preempts the application of state penal law to crimes which occur in the workplace has been considered by the highest courts of New York, Illinois, and Michigan. The Supreme Courts of Illinois and Michigan, like the New York Court of Appeals, have held that state penal law is not preempted. *Chicago Magnet Wire*, 126 Ill.2d 356, 534 N.E.2d 962; *Hegedus*, 432 Mich. 598, 443 N.W.2d 127. The Wisconsin Court of Appeals also held that state law is not preempted and the Wisconsin Supreme Court declined to review the matter. *State ex rel Cornellier v. Black*, 144 Wisc.2d 745, 425 N.W.2d 21 (Ct.App. 1988), *pet. for review denied*, 145 Wis.2d 916, 430 N.W.2d 351 (Wisc. 1988). The only appellate court which has held that state law is preempted is an intermediate appellate court in Texas. *Sabine Consolidated, Inc. v. State of Texas*, 756 S.W. 2d 865 (Tex. App. 1988). That decision was made without the benefit of the decisions of the highest courts of New York, Illinois and Michigan.[5] Thus, there are no conflicts among the states which warrant review by this Court.

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5 *Colorado v. Kelran Const. Inc.*, 13 OSHC 1898 (D. Ct. Colo. 1988), cited by petitioners, was also decided before the decisions of the three high courts and was never appealed. *Thornock v. State*, 229 Mont. 67, 745 P.2d 324 (Mont. 1987), also cited by petitioners, did not involve the application of state criminal law, but rather the question of whether Montana had a duty under state law to inspect a workplace where the plaintiff was injured or whether that duty was superseded by federal law. That case is therefore irrelevant to the question of the preemption of state criminal law.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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